

January 5, 2005

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON VARIANCE APPEAL

SUBJECT: Department of Development and Environmental Services File No. **L03VA013**

LLEW JOHNSON
Variance Appeal

Location: 8909 Northeast 118th Place, Kirkland

Appellants: Llew Johnson and Nancy Hatcher, *represented by*
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Intervenors: Angie and Jerrett Mentink, *represented by*
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King County: Department of Development and Environmental Services,
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And

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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	December 16, 2004
Hearing Closed:	December 21, 2004

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS OF FACT:

1. On August 10, 2004 the King County Department of Development and Environmental Services denied a variance application for Llew Johnson to approve setback reductions necessary to legalize an existing residential outbuilding located at 8909 Northeast 118th Place, Kirkland. On the same date, DDES also issued a notice and order revoking building permit B02M2125 applicable to the same structure. The variance denial concluded that the relief requested was not the minimum necessary based on the existence of available alternative locations not requiring the same setback reductions; that strict application of code requirements would not create an unnecessary hardship or deprive the subject property of rights and privileges enjoyed by other owners in the vicinity; and that steep slope requirements also precluded approving a variance in this location. The notice and order canceling the building permit is based on the provisions of KCC 23.24.100.A.3 authorizing revocation of a permit issued in error or "on the basis of materially incorrect information supplied to the county." Mr. Johnson has filed timely appeals of both the variance decision and the notice and order, and the two appeal proceedings were consolidated for review within a single hearing.
2. A pre-hearing conference on the consolidated appeals was held on September 23, 2004, at which time the owners of neighboring property to the west, Angie and Jerrett Mentink, were admitted to the proceeding as intervenors. The Examiner also allowed the variance application to be modified to include a steep slope setback reduction request to be supported by a supplemental geotechnical study. The Appellant has modified his variance proposal to include relocation of the western wall of the existing outbuilding to a location 5 feet from the adjacent property line.
3. Llew Johnson and Nancy Hatcher purchased the property located at 8909 Northeast 118th Place in 2000 and proceeded to obtain county permits for the removal of an older existing residence and its replacement with a new house in generally the same location. The property sits on the side of Goat Hill overlooking Juanita Bay to the south and slopes to the south at angles both above and below 40%. In general, properties within this section of 118th Place tend to have greater than 40% slopes east of the Johnson residence and less than 40% slopes to the west.
4. The question of whether the slopes on the Johnson property actually exceed 40% has never been precisely determined, but the operating assumption has been that approximately the southern 1/3 of the parcel is constrained by 40% slopes. On that assumption both the older Johnson residence

and its newer replacement impinge upon the standard regulatory steep slope buffer. But since the older home was a non-conforming structure that was being replaced by a building with only a modestly larger footprint, the zoning code allows such replacement to occur as a permitted use based on the older structure's grandfathered status.

5. KCC 21A.24.060.A.2 authorizes the replacement of a single-family dwelling constructed before 1990 within a steep slope hazard area if the new structure does not increase the existing footprint of the old structure by more than 1,000 square feet, and the intrusion of the new structure into the sensitive area or its buffer is not increased. Neither the new Johnson residence nor the adjacent slope area has ever been surveyed, and the new building's precise location on the lot and its footprint area vary from drawing to drawing within the record. It is a reasonable generalization, however, to conclude that the new footprint of the replacement Johnson residence appears to occupy no more than 700 square feet of the 1,000 square feet of bonus area authorized by KCC 21A.24.060.A.2. Thus it appears that a 300 square foot attached garage could have been approved in 2001 as part of the partial exemption from steep slope requirements authorized for the replacement residence.
6. Be that as it may, at the time of residence replacement no new garage was built, the old garage in the property's northwest corner continued to be used for storage and shop purposes, and the Johnson residence was served (as it is now) by on-site open parking in front of the house.
7. In 2002 Mr. Johnson began to make plans to replace the existing garage, which appears to have been constructed sometime in the 1930's and had become largely dilapidated. As it existed in 2002, the northeast corner of the old garage extended into the Northeast 118th Place right-of-way at least 7 feet, and its northwest corner was nearly flush with the western lot boundary. In this location the old garage extended into the right-of-way, violated the current street setback and the interior setback requirement as well. In the summer of 2002 Mr. Johnson obtained special use permit no. S-89-02 from the King County Property Services Division authorizing him to retain the existing structural intrusion into the right-of-way. As an existing legal non-conforming structure, the garage was allowed by the zoning code to be reconstructed in its existing location within the street and side yard setbacks.
8. Mr. Johnson, through his architect, obtained a building permit on December 20, 2002 (file no. B02M2125) to replace the old garage. The construction permit contains on its face the following notations: "Replace existing w/identical" and "demolish existing garage and replace with identical". These same notations appear on an application acknowledgement issued November 26, 2002 and are documented within the computerized log for the building permit within a comment that reads: "agent states there will be no expansion of existing non-conforming structure in footprint or in height". A later statement in the computerized log notes for this permit application dated December 13, 2002 reiterates that the "proposal is in the same footprint as existing garage". Finally, the Applicant's building permit site plan contains a notation that reads "proposed replacement of existing garage".
9. The building permit plans that were approved by the county depict a structure that has a larger footprint than the old garage to be demolished. The old garage measured 12 by 18 feet for a total floor area of 216 square feet, while the footprint depicted in the building permit plans measured 42% larger at 14 by 22 feet, or 308 square feet. In addition, the old garage had its garage door on the north side facing the street while the new garage plan proposed (according to Mr. Johnson, at DDES's insistence) a garage door on the south side. A curious aspect of the building permit

plans is that they show retaining walls on the south side of the new structure but depict no driveway connection from the garage door to the roadway.

10. A great deal of hearing testimony focused on why the garage door was moved to the south side of the building, why there was no driveway depicted, and describing Mr. Johnson's analytical process in eventually deciding that a south side garage door entrance was not a practical option. In reality, however, the entire garage door and driveway discussion is a red herring because the structure that Mr. Johnson actually built was not a garage at all. There is no garage door installed on either the north or south sides. The structure is at best a shop building with a storage area, or at worst an accessory dwelling unit.
11. Moreover, the new outbuilding was even larger than depicted on the building permit plans. According to Intervenor Mentinks's survey the new foundation measures 23.7 feet by 15.25 feet for a floor area of approximately 361 square feet. This foundation footprint area is 17% larger than the design approved within the building permit and 67% larger than the original garage that it replaced.
12. The new outbuilding now also contains an overhanging second story with view windows toward Lake Washington and a floor area of about 426 square feet, to which is appended a deck that increases the total second story floor area to 526 square feet. In addition, above the second story is a third story loft which increases the building's height some 7 to 10 feet above the elevation represented in the building permit plans. And finally the enlarged building footprint has been shifted some 7 to 10 feet south so that it now is entirely outside of the right-of-way but about 16 feet closer to the steep slope edge.
13. Overall, Mr. Johnson's revisionist history of the garage construction process appears to be a creative blend of fiction and fact. The findings in this report do not accord much weight to his story and are derived primarily from the documentary record.
14. The discrepancies between the building permit drawings and the actual building under construction were not identified by building inspector Rick White until after the foundation inspection had occurred and a framing inspection had been requested. Mr. White issued a correction notice to Mr. Johnson on May 2, 2003 requiring DDES approval of plan revisions before any additional construction could occur. On May 19, 2003 he posted the site with a stop work order. It is agreed that Mr. Johnson has not violated this stop work order.
15. A supplemental study was performed by Geotech Consultants, Inc. dated October 1, 2004 to evaluate slope stability in the area of the newly constructed outbuilding. The study reports that an "excavation revealed medium-dense to dense, native silty sands under the main portions of the garage foundation" and that these native soils are "adequate for support of the new garage". The study further states that "the main portion of the garage is on the order of 22 plus feet from the top of the steep slope and the overhanging deck posts are about 18 plus feet from the top of the slope" and the "existing houses to the east and west are located approximately 14 feet closer to the top of the slope than the garage".
16. The consensus of witness testimony was that most of the houses in this hillside neighborhood are built near the upper edges of steep slope areas and that no stability problems have been encountered in any of these locations. KCC 21A.24.310 requires a 50 foot buffer to be

established from the top of a 40% slope, but allows such buffer to be reduced to 10 feet based on a geotechnical study that establishes slope stability. On the other hand, if the slope soils are deemed erosional the buffer reduction is limited to 25 feet. Goat Hill is in a mapped erosion hazard area, but the development history in this neighborhood demonstrates a general absence of erosional soils. Nothing in the record suggests that with an appropriate study the soils on the Johnson property will not be determined non-erosional as well. Based on the required studies, the steep slope buffer on this property in all likelihood can be reduced to 10 feet plus a 15 foot building setback line.

17. The current Goat Hill residential neighborhood was cobbled together out of old 25 foot-wide camping club lots that were platted nearly 100 years ago. As a consequence of this history, lots tend to be oddly shaped and the roadway system is narrow, steep and winding. Most of the older structures in the neighborhood are non-conforming with respect to presently required setbacks, and variances have been issued to accommodate more recent construction. Due to the slope conditions many residences in the neighborhood are served by parking pads located within the street setback area instead of garages, and some driveways extend into the right-of-way. But as far as the record demonstrates, Mr. Johnson's old garage was the only building that physically intruded into the right-of-way. The hearing record also contains some talk about view corridors from Northeast 118th Place, and undoubtedly pedestrians walking along the road can catch occasional peek-a-boo views of the lake. An individual driving a vehicle along Northeast 118th Place in this location would be ill-advised to take his or her eyes off the road to enjoy the scenery.

CONCLUSIONS:

1. With respect to his desire to construct a new garage on his property, Llew Johnson had two separate and very different options. The first was to take advantage of the old garage's legal non-conforming status and build a new structure of the same size in the same location. If that option is chosen, it makes no difference that the new building will violate street and side yard setbacks because its grandfathered status renders these later legal limitations inapplicable. The second choice was to forfeit the privilege of reconstructing a non-conforming structure and to build an entirely new garage with new dimensions in a different location. If that option is chosen, the prior existence of the non-conforming structure is rendered irrelevant. The new non-grandfathered proposal must stand or fall on its own merits.

Mr. Johnson's problem, and the primary reason this process became such a lengthy and agonizing ordeal, is that he has improperly attempted to conflate the two procedures. He wants a new garage different in size and location from the one that existed previously, but he wants to use the abandoned non-conforming structure as partial justification for the new building. This is an illogical and unacceptable strategy. If Mr. Johnson is entitled to a variance, it will be on the basis of his new proposal alone, without reference to the abandoned non-conforming garage. Mr. Johnson's invitation that we should look at the variance proposal in the context of the non-conforming structure and somehow "split the difference" is legally and intellectually indefensible. Our review of the variance request will be based on the assumption that the old garage no longer exists and is no longer material to our analysis.

2. The standards for granting a variance are stated at KCC 21A.44.030 and are twelve in number. Our discussion will be limited to those provisions that appear to bear directly on this application; for those standards that are not specifically discussed, the conclusion will be that such standards

are obviously either met or not implicated by our review. The Appellant's request is one for relief from the street and side setbacks applicable to the property as well as from the steep slope buffer requirement. For the purposes of our analysis we assume that a reasonable single-car garage measures 15 by 20 feet and has a floor area of 300 square feet.

3. KCC 21A.44.030.A. requires that an applicant demonstrate that the “strict enforcement of the provisions of this title creates an unnecessary hardship to the property owner”. It is clear that if there is to be any garage on the property, then at least some degree of variance relief will be necessary. While the standard street setback for the R4-zone is only 10 feet, the driveway length requirement is 20 feet and becomes the operational setback for a garage. South of the street, assuming that no erosion hazard exists and the steep slope buffer can be reduced to 10 feet plus a 15 foot building setback, this leaves a legally unencumbered narrow strip west of the house that is about 30 feet long and 13 feet wide at its west end, tapering down to 5 feet at its eastern end. This unencumbered strip is not wide enough to accommodate a garage, and its awkward east/west orientation renders improbable any proposed driveway access.
4. The requirement of KCC 21A.44.030.B. is that the variance be “necessary because of the unique size, shape, topography, or location of the subject property”. While the term “unique” cannot be applied literally without examining every other lot in unincorporated King County, it is plain enough that a fundamental reason for the development constraints on the Johnson parcel is the slope of the property. Without steep slopes no variance would be necessary. The basic requirement of subsection B is therefore also met.
5. KCC 21A.44.030.C. requires a conclusion that the property by operation of applicable regulations is deprived of “rights and privileges enjoyed by other properties in the vicinity and under an identical zone”. Although the evidence indicated that a number of other houses on Goat Hill have parking pads instead of garages, garages do exist in this neighborhood and are generally regarded to be a normal amenity of single-family suburban life. We see no compelling reason to regard a free-standing garage as constituting more of a privilege than an attached garage. Therefore, the fact that Mr. Johnson's garage may be the only free-standing outbuilding in the neighborhood should not categorically deprive him of the joys of having such a structure.
6. Passing by subsection D. for the moment, KCC 21A.44.030.J. requires that the variance be “the minimum necessary to grant relief to the applicant”. This is where Mr. Johnson's request becomes problematic. The record indicates that the steep slope buffer plus setback can be reduced to a total of 25 feet with special studies. If so, there is no reason for the garage to intrude into the street setback to the degree that it does. The outbuilding as constructed has been located at a zero setback from the edge of the right-of-way, which will necessitate the entire driveway to be constructed within the right-of-way itself. If the structure were to be built with its south wall up against the 25 foot slope buffer plus setback line, a street setback of about 7 feet could be preserved at a location adjacent to the west side of the house, and a street setback of approximately 10 feet could be obtained at a location further west. Therefore, even if the garage proposal as revised moves its western wall east of the 5-foot interior setback, the minimum necessary requirement is not met with respect to the street setback.
7. Returning now to KCC 21A.44.020.D., this subsection requires a demonstration that the variance does not “create health and safety hazards, is not materially detrimental to the public welfare or is not unduly injurious to property or improvements in the vicinity”. Our conclusion is that the failure of the proposal to maximize the available street setback violates this requirement as well.

Northeast 118 Place is a narrow, winding, steep road. Structures that unnecessarily crowd the right-of-way not only create visibility problems for motorists and reduce the margin of driving error for errant vehicles but they also increase safety hazards for bicyclists and pedestrians by reducing escape routes from oncoming cars. In addition, as pointed out by staff, the existing Johnson residence is served by an asphalt loop driveway. Designing a new garage to be placed further south away from the road and east toward the house would allow the structure to be served by the existing driveway street cut rather than requiring a new separate access. In this constrained location, consolidating access points would reduce traffic conflicts and increase safety.

8. Finally under subsection D. there is the question of the variance's impact on the public welfare. One of the bothersome aspects of this proceeding is Mr. Johnson's obvious attempts to game the system. It is no great secret that as regulations become more complex and county staffing levels are reduced by budgetary limitations, a popular development strategy has become one of telling the administrative intake people what they want to hear in order to get the permit, then building whatever you want in the expectation that overworked inspectors will have neither the time nor inclination to require that the approved plans be strictly followed. Goat Hill with its slopes, narrow streets and undersized and oddly shaped lots is an area where the temptation to circumvent development regulations must be very great indeed. It is in the public interest, therefore, that now and then someone in the neighborhood who attempts to game the system not only gets caught but is held accountable for his mistake. Without such an occasional cautionary message, circumvention of permitting requirements could become even more rampant and the entire community would suffer as a consequence.
9. The Johnson variance application is not the minimum necessary to grant relief to the Applicant, would create safety hazards and as a precedent would be materially detrimental to the public welfare. The variance must be denied.

DECISION:

The variance is DENIED.

ORDERED this 5th day of January, 2005.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 5th day of January, 2004, to the following parties and interested persons of record:

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NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision.

MINUTES OF THE DECEMBER 16 & 21, 2004, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NOS. L03VA013 & E0400454.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Sherie Sabour, Brenda Wood, Cass Newell, Ken Dinsmore, Greg Wessel and Rick White, representing the Department; W. Theodore Vander Wel, representing the Appellant; David S. Mann, representing the Intervenor; and Llew Johnson, James H. Strange, Jr., Shorty Mehrer, Angie Mentink and Tim Slotta.

The following Exhibits were offered and entered into the record:

Exhibit No. 1 DDES File No. L03VA013

Exhibit No. 2 DDES Code Enforcement Report to the Hearing Examiner for E0400454

Attachment 2 – Notice of Violation for E0400454

Attachment 3 – Notice and Statement of Appeal for E0400454

Attachment 4 – Copies of Code Sections Cited in the Notice and Order

Attachment 5 – Construction Permit; Permit Number B02M2125

Attachment 6 – Zoning Variance Report and Decision dated August 10, 2004

- Exhibit No. 3 Assessor's Map; Section 30, Township 26, Range 5
- Exhibit No. 4 Copies of the site plan, Geo-tech notes and intake information (7 pages) from Building Permit File B00L1266
- Exhibit No. 5 King County Codes regarding Nonconformance
- Exhibit No. 6 Comments dated October 15, 2004
- Exhibit No. 7 Site Map submitted by Llew Johnson
- Exhibit No. 8 Large Site Map/Notations made by Llew Johnson
- Exhibit No. 9 Large Depiction of the lot with the house & proposed garage; prepared by Mrs. Johnson
- Exhibit No. 10 Building Drawings
- Exhibit No. 11 Letter to Sherie Sabour from Llew Johnson dated March 5, 2004
- Exhibit No. 12 Photograph of old garage
- Exhibit No. 13 Photograph of the retaining wall built between the Johnson property and the Mentink property
- Exhibit No. 14 Three drawings showing slope angles
- Exhibit No. 15 James H. Strange, Jr. resume
- Exhibit No. 16 Letter to Llew Johnson c/o Mehrer Construction from Geotech Consultants, Inc. dated December 11, 2000; Re: Geotechnical Engineering Study
- Exhibit No. 17 Letter to Llew Johnson from Geotech Consultants, Inc. dated October 1, 2004; Re: Steep Slope Setback Concerns
- Exhibit No. 18 Photographs (5) of Johnson's old garage taken by Angie Mentink sometime in 2002
- Exhibit No. 19 Photographs (9, a-i) of Johnson's new garage
- Exhibit No. 20 Colored Sheet showing the different properties
- Exhibit No. 21 Photographs (12) of other homes in the neighborhood taken by Angie Mentink
- Exhibit No. 22 Letter to Mrs. & Mrs. Mentink from Timothy Slotta dated November 18, 2004; Re: Geotechnical Construction Evaluation with an aerial photo
- Exhibit No. 23 Inspection Log by Rick White of DDES dated January 2003
- Exhibit No. 24 Inspection Notice/Correction Sheet by Rick White of DDES dated May 2, 2003
- Exhibit No. 25 Photograph showing the new building

The following exhibits were offered and entered into the record on December 21, 2004:

- Exhibit No. 26 Notice on Title Requirements – 1
- Exhibit No. 27 Statement of Encroachment and Acknowledgement of County Interest
- Exhibit No. 28 Photos (2) of old garage taken December 3, 2000

SLS:gao
L03VA013 RPT